

10. PUBLIC COMMENT LETTERS AND E-MAILS

Received during 45-day comment period

Received during 15-day comment period

**Comments Received During
45-Day Comment Period**

Public Comments

Received during 45-day comment period:

Department of Consumer Affairs, letter dated 3/20/07

Department of Toxic Substances Control, letter dated 3/28/07

C. E. Smith, letter dated 4/2/07



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March 20, 2007

Linda Brown
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**Re: Proposed Changes to Title 1 of the California Code of Regulations Relating to
Emergency Regulations**

Dear Ms. Brown:

The Legal Affairs Division of the Department of Consumer Affairs submits the following comments and recommendations regarding the proposed changes.

1. Section 50

This proposed section contains several drafting errors that reduce the clarity of the proposed regulation, as follows:

--The words "that it" should be deleted from subdivision (a)(1)—"A statement confirming that the submitting agency *that it* has complied with..."

--Subdivision (a)(2) is unclear. It requires a "statement *confirming that the submitting agency* that the emergency situation addressed by the regulations clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest." It is not possible to ascertain from this language exactly what the statement must include and the proposal should be clarified and re-submitted for further comment.

--The clarity of subdivision (c) would be improved if it were modified to read as follows: "OAL shall disapprove an emergency regulation that includes a statement submitted pursuant to subdivision (a)(2) if it determines that the finding of emergency does not satisfy the requirements of subdivision (b)." Our suggested change also makes the subdivision more consistent with subdivision (a), which provides that state agencies "submitting emergency regulations to OAL pursuant to Government Code section 11136.1 shall include with the emergency regulations..." one of the statements described in paragraphs (1) and (2).

2. Section 52

Subdivision (b)(2) requires an agency seeking to readopt an emergency regulation to provide OAL with "Updated documentation required by section 11346.1 of the Government Code for the initial submission of the emergency regulation, if necessary to reflect circumstances that have changed since the initial adoption or prior readoption."

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This language is unclear and confusing. We prefer the following language (derived in part from that contained in your Initial Statement of Reasons): "Either a statement that circumstances are unchanged since the initial adoption or prior readoption or, if circumstances have changed since that time, an update of the documentation required for the initial adoption."

This latter language is much clearer than and provides better guidance to agencies than the proposed language. It more clearly states the circumstances under which this documentation is required and does not suggest that updated documentation is required each time an agency seeks to readopt an emergency regulation.

Sincerely,

DOREATHEA JOHNSON
Deputy Director
Legal Affairs



By ANITA SCURI
Supervising Senior Counsel



Alan C. Lloyd, Ph.D
Agency Secretary
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Arnold Schwarzenegger
Governor

March 28, 2007

Ms. Lynda C. Brown
Deputy Director
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Dear Ms. Brown:

Thank you for allowing impacted state agencies the opportunity to comment on the proposed amendments to Title 1 of the California Code of Regulations. The Department of Toxic Substances Control (DTSC) has a concern about proposed section 50, relating to findings of emergency. DTSC's comments and suggestions are:

COMMENT ON SECTION 50, SUBDIVISION (a)

Subdivision (a) requires that a finding of emergency must include either a finding that the submitting agency has complied with Government Code section 11346, or a statement confirming that "the emergency situation addressed by the regulations clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest."

It is ambiguous whether the requirements of subdivision (a) apply to situations where the Legislature, by statute, has already declared that a situation requires or allows the promulgation of an emergency regulation. DTSC believes it would be redundant, and possibly in conflict with statutory law, to require an agency to justify the existence of an emergency where that decision has already been made by the Legislature.

At a training session on November 29, 2006, attended by DTSC representatives, Mr. Bill Gausewitz, Director, OAL, advised that, if the Legislature has dictated that regulations should be adopted as or deemed to be emergency regulations, no further showing is required beyond citing the operative statute. DTSC strongly supports that interpretation as stated by Mr. Gausewitz. However, an oral statement at a training class does not have force of law--or even weight as regulatory history. Therefore, DTSC believes that

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the regulation should provide clarity on this point.

SUGGESTIONS

DTSC suggests that the following or similar language be added at an appropriate place in section 50:

"No finding of emergency is required by this section if the Legislature, by statute, has determined that a regulation may be promulgated by emergency procedures."

Clarifying the regulation on its face is the preferred alternative. But if this is not done, then, at a minimum, the Final Statement of Reasons should provide written affirmation of the policy stated by OAL at the training.

OTHER SECTIONS

DTSC has no comments or suggestions on the other sections that would be amended by the regulation package. Its only concern relates to proposed section 50.

If you have any questions, you may contact Dennis Mahoney of my staff at (916) 324-0339 or dmahoney@dtsc.ca.gov.

Sincerely,



Elizabeth Yelland
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Office of Legal Affairs

To: The Office of Administrative Law
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2 APRIL 2007

From: C. E. Smith 
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Subject: Comments Regarding Proposed Rulemaking by the Office of
Administrative Law-- Adoption of 1 CCR 50, 52, and 54, and Amendment
of 1 CCR 55

General Comments: In reading the proposed regulations, a notable omission becomes apparent. There is no attempt made to address the particular, but ubiquitous, circumstance of statutorily authorized or mandated emergency regulations, sometimes referred to as "deemed" emergency regulations. Since one may anticipate that, following enactment of AB 1302, such "deemed" emergency regulations will become even more popular; addressing the matter is of some importance in order to provide adopting agencies with clear guidance as to how to proceed.

As asserted on page 3 of the present Initial Statement of Reasons (ISOR), the "purpose of the advance notice requirement of AB 1302 was to increase the opportunity for interested persons to comment upon emergency regulations prior to their enactment (*sic*)". Assuming this statement to be valid, there is an obvious conflict with any "deemed" emergency regulation, particularly, but not exclusively, where review by the Office of Administrative Law (OAL) is also proscribed.

First, there can be no meaningful public dialog with regard to the emergency circumstances involved, as the relevant statute has dictated that such emergency exists and that emergency regulations are necessary. Second, there can be no action by OAL with regard to the emergency regulations themselves in those frequent instances where a prohibition against OAL review also exists (beyond OAL assuring itself that the proffered emergency regulations fall within the scope of the underlying statute). Thus any public comment period for such "deemed" emergency regulations would either be severely limited or profoundly moot.

The stated purpose for the comment period would not be served by subjecting such "deemed" emergency regulations to the notice requirement of AB 1302. Hence, a pragmatic alternative would be to categorically exempt "deemed" emergency regulations from this requirement. This exemption could take a number of forms, including a paragraph (3) added to proposed section 1 CCR 50(a), which would provide for a statement regarding the relationship of the

emergency regulations to the enabling statute. (1 CCR 50(c) would require a corresponding revision as well.)

The issue of "deemed" emergency regulations also touches upon and illuminates a misstatement in the Informative Digest for the proposed regulations. In the second paragraph of the digest, the statement is made that "AB 1302 requires an agency adopting emergency regulations to provide five working days advance public notice of the adoption (Government Code § 11346.1(a)(2))" (emphasis added). Whereas in fact, Government Code § 11346.1(a)(2) states that "At least five working days before submitting an emergency regulation to the office, the adopting agency shall, except as provided in paragraph (3), send a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency" (emphasis added). The misstatement in the digest is significant on at least two counts. First, it blurs the distinction between adoption and filing with OAL, with the result that it obscures the fact that there is no requirement for any notice prior to the adoption of an emergency regulation. Second, the resultant obscurity may falsely lead one to conclude that all emergency adoptions would be subject to the putative notice requirement. However, several statutes provide that, for certain "deemed" emergency regulations, the adopting agency is directed to file the regulations directly with the Secretary of State and subsequently to transmit (not submit) the regulations to OAL for printing purposes only. Clearly, such regulations would be both adopted and (usually) in effect prior to the transmittal to OAL. Equally clearly, no purpose would be served by subjecting such regulations to any notice requirement apart from that already provided prior to enactment of AB 1302. Yet the misstatement in the digest might well mislead both the public and adopting agencies on this point. Perhaps the circumstance that Government Code § 11346.1(a)(2) is confusing enough to give rise to the misstatement in the digest suggests that the matter should be clarified through regulation.

Another omission of concern for emergency regulations, both "deemed" and otherwise, stems from the FOE requirements in 11346.1(b)(2) for "demonstrating, by substantial evidence, the need for the proposed regulation" and to "identify each technical, theoretical, and empirical study, report, or similar document...upon which the agency relies." While it has been suggested in workshops offered by OAL that these requirements do not *necessarily* entail importing the entire ISOR, which essentially performs these functions per Government Code section 11346.2(b)(1) and (2), into the finding, no one has clarified just what "substantial evidence" and other materials short of that to be customarily found in an ISOR would satisfy the requirements. Thus it would provide valuable guidance for OAL to address this issue through regulation.

Absent such clarifying regulation, how would one discern in advance what criteria OAL might apply to determine if an adopting agency has satisfied these requirements in a FOE? If an agency must, in the view of OAL, essentially duplicate the ISOR within the FOE, this would significantly increase the volume

of material that must be duplicated and distributed in order to comply with the notice requirement found in Government Code section 11346.1(a)(2), with concomitant increases in lead time and costs.

The FOE requirements are particularly problematic for "deemed" emergency regulations (and perhaps even more acutely where OAL review is also excluded). The existence of a statutorily "deemed" emergency (which moreover deems the action to be "necessary") would appear to render any demonstration of need moot beyond establishing the requisite nexus between the deeming statute and the emergency action. For a "deemed" emergency regulation, a clarification of what FOE content would be considered essential by OAL would appear to be indispensable.

Specific Comments:

1. 1 CCR 50. The statements required under subsection (a) are to be included "with the emergency regulation", but the manner of that inclusion is not specified and, hence, unclear. Are the statements to be attached to the STD 400, incorporated in the finding of emergency (as are the "specific facts" required under subsection (b), which follows), or provided in a separate document? Moreover, are the statements to take the form of a "certification" as implied by the use of this term in paragraph (b)(1) and on page 3 of the ISOR? If a certification is required, then must the certification be made under penalty of perjury, or not?

Please note that neither of the paragraphs under subsection (a) scan from a grammatical perspective and are thus unclear. In paragraph (a)(1), simply removing the phrase "that it" would appear to render the sentence grammatically correct. In paragraph (a)(2), removing the phrase "that the submitting agency" and inserting the phrase "by the submitting agency" following the word "statement" would have a similar remedial effect.

Subsection (b) requires the inclusion of certain "specific facts" within the finding of emergency (FOE). The ISOR entry for this subsection does not explain the basis for the inclusion of this material within the FOE. Upon examination, the material would appear to be more suitable for inclusion within the statement required under subsection (a)(2), rather than the FOE.

First and foremost, the FOE represents an attempt to establish that an emergency situation exists and that immediate regulatory action is necessary to address that situation. In large part, the FOE may be viewed as endeavoring to satisfy the definition of emergency in Government Code section 11342.545. Thus, the FOE seeks to establish that an emergency exists, not to distinguish between emergencies and "über-emergencies."

On the other hand, the statement required under subsection (a)(2) appears to be an attempt to provide a mechanism for distinguishing one emergency from another under the spurious scheme now enshrined in Government Code section 11346.1(a)(3). Whatever one may think of the scheme, the purpose is clearly to distinguish qualitatively between two or more situations that separately and equally satisfy the definition of emergency. Thus the inclusion of "specific facts" to this end is alien to the purpose of the FOE and their inclusion would pollute the purpose of that document and lead to pointless confusion and contention.

Including material in the FOE that fails to establish that an über-emergency exists would inevitably cast a cloud over the emergency that would otherwise obtain. Consider the situation should OAL disapprove an emergency regulation on the basis that the "specific facts" addressing the über-emergency were inadequate, notwithstanding that an emergency had otherwise been clearly established by the FOE. Even should OAL subsequently approve the emergency action following the requisite notice or a suitable augmentation of the "specific facts", some shadow of doubt must still obtain as to the adequacy of the FOE. After all, how could OAL not have approved an emergency regulation for which an emergency had clearly been demonstrated to exist and for which the regulatory action was clearly and immediately necessary to address? Having a separate document from the FOE that would serve the purpose of identifying über-emergencies and that could be independently deniable would appear to be a more flexible and less confusing approach. Moreover, this approach would not place OAL in a potentially untenable, not to say compromising, position with regard to decisions concerning the FOE.

If the "specific facts" demanded by subsection (b) are relocated to the statement required by paragraph (a)(2), the language of subsection (b) should also be modified to require the return of an emergency regulation to the adopting agency rather than the disapproval of the emergency regulation. This would be consistent with the concept that the inadequacy of the "specific facts" to support an über-emergency represents a procedural defect rather than any determination with regard to the fundamental adequacy of the FOE in supporting an emergency as defined in Government Code section 11342.545.

In paragraphs (b)(1) and (b)(2), the terms "substantial" and "serious" are employed to the detriment of clarity. While such terms may be found in the underlying statute, the use of such terms in administrative regulation is not infrequently considered vague and confusing. Indeed, OAL would be well within its rights to hold that the unconditional use of these terms in regulations issued by another state agency would constitute a failure to meet the clarity standard for regulations. In the present context, the terms

lead to a "we'll know it when we see it" standard that provides little that is useful in "distinguishing those emergency situations which require advance public notice and a mandatory comment period from those that do not", the ISOR entry notwithstanding. In this context, it may be instructive to consider that, in promulgating administrative regulations, OAL is carrying out a quasi-legislative role in which clarity of guidance is paramount, rather than a quasi-judicial role in which "substantial evidence" might prove a viable test. Certainly, state agencies stand in sore need of guidance in coping with the vagaries of Government Code section 11346.1(a)(3).

For example, would opportunity costs be considered as constituting "such a...serious" harm as to satisfy Government Code section 11346.1(a)(3)? Would a state agency's failure to adopt timely regulations in order to secure federal funding of a health or law enforcement program be "such a...serious" harm? Or would the gravity of the harm depend on the amount of the funding in question? Given the size of the California economy and state budget, would a lost opportunity to secure \$100,000, or \$1 million, or even \$1 billion be considered "such a...serious" harm? Similarly, in the case of an outbreak of food poisoning or a pandemic, how does one gauge what constitutes "such a...serious" harm? One case, or 100, or how many? Note that these same questions also relate to the question of "substantial" evidence. Would documentation of one case constitute "substantial" evidence, or would more be required (and how many more)?

Of course, one cannot reasonably expect that anyone could draw up a set of objective criteria which would guide state agencies in dealing with all the potential emergencies California faces. The point is rather that the proposed subsection (b) does not provide useful guidance beyond that already implicit in the admittedly flawed statute. It may be said of guidance what is said of information in general, it is that which reduces uncertainty. Regrettably, subsection (b) fails this test and therefore does not meet the necessity standard for regulations.

This contention is further borne out by the 12-day period advanced in paragraph (b)(1) as the "litmus test" for distinguishing emergencies from über-emergencies. The ISOR attempts to persuade us that 12 days is "the minimum amount of time that is added to the emergency ...process" and that, if an agency cannot "demonstrate the requisite (*sic*) harm" within this period, then "there is adequate time to complete the notice and comment process." Quite apart from representing both a breathtaking *non sequitur* and a refreshing optimism regarding the responsiveness of government entities, the premise is flawed at its core in asserting that the 12 days represents the "minimum amount of time" added to the emergency process imposed upon state agencies.

The notice required by Government Code section 11346.1(a)(2) does not spring fully formed, like Athena from the brow of Zeus, on the day the sending of the notice is mandated. Government Code section 11340.85(b)(2) prohibits state agencies from making electronic communication the "exclusive means" by which documents required by the APA are published or distributed. In practical terms, this leaves state agencies no choice but to consider the logistics of printing and distribution when contemplating seeking an exemption from the notice requirement found in Government Code section 11346.1(a)(2). Many agencies are constrained to rely on the Office of State Publishing, whose services entail a lead time of approximately 30 days (from the standpoint of both prudence and reason) in order to assure completion of a non-trivial document by a specified date. Therefore the minimum time added to the process would, in practical terms, be not only the 12 days suggested, but also the additional time dictated by the logistics involved...a total of about 42 days. Clearly as a catchment for the accretion of "requisite harm", a period of 42 days would yield a greater potential for success than a period only a trifle over a quarter of this number of days. A state agency would have to determine whether or not it could in good conscience countenance a delay of 42 days, not 12, in addressing a situation that, by definition, "calls for immediate action to avoid serious harm."

With all due commiseration, subsection (b) represents a valiant, if ultimately vain, effort to skirt the inconsistencies occasioned by the imposition of the delays attendant upon enactment of Government Code section 11346.1(a)(2) and the necessity for immediate action dictated by both Government Code sections 11342.545 and 11346.1(b)(3). No arbitrary time frame, no matter how superficially related to the emergency process, could serve to distinguish meaningfully between two actions both deemed "most pressing or urgent", for that is the very definition of "immediate." After all, could one in earnest argue that, should "serious harm" fail to be demonstrated to accrue until the 13th, or even 43rd day, the public should be forced to suffer a lengthy additional delay in obtaining "immediate" relief?

There are a few final minor notes with regard to paragraph (b)(2). The paragraph calls for "substantial evidence that enactment of the proposed regulation can be reasonably expected to prevent or significantly alleviate that serious harm" (emphasis added). First, note that since the measure has yet to be implemented, what is being called for is more properly characterized as "substantial speculation" than as any sort of evidence. Second, administrative regulations are adopted, not enacted, by state agencies. Third, when received by OAL, the regulation would have already been adopted and cannot be considered "proposed" at that point, merely not effective as yet (with some exceptions). Fourth, both

"reasonably" and "significantly" are subjective terms that are inherently unclear absent a standard to measure them by. Fifth, it is unclear whether or not the "proposed" regulation must forthwith achieve a prevention or amelioration of the serious harm accrued within the 12 days specified in paragraph (b)(1), or at some indefinite point in the future. However, the use of the phrase "alleviate that serious harm" (emphasis added) may be read to imply that, however unlikely, the criterion could be interpreted as a demand for a virtually instantaneous prevention or amelioration.

The serious defect that exists with regard to the inclusion of the "specific facts" within the FOE as required by subsection (b) has already been described. In essence, subsection (c) merely compounds this error. If a situation exists that satisfies the definition of emergency in Government Code section 11342.545, and, moreover, the FOE contains the necessary elements to satisfy the requirements of Government Code section 11346.1(b), then how could OAL direct itself to disapprove the emergency action? Remember, this would be an action that had been established to be necessary for the immediate avoidance of serious harm to the public peace, health, safety, or general welfare. Disapproval would be unconscionable.

At the least, subsection (c) should be amended to require OAL to return an emergency regulation for which OAL had determined that a statement submitted pursuant to subsection (a)(2) was unsupported by the "specific facts" furnished (hopefully to be provided therein). While this would still leave OAL in the unenviable position of having delayed a regulation necessary for the immediate avoidance of serious harm to the public peace, health, safety, or general welfare, such is the apparently inevitable consequence of the enactment of AB 1302. But with this revision, OAL could at least avoid the stigma of having disapproved an emergency regulation based on the same emergency circumstances as it subsequently approves the emergency action (following the requisite notice or an amended set of "specific facts").

On a trivial note, subsection (c) refers to both subsection (a) and subsection (b) as subdivisions. The convention followed in the California Code of Regulations is to employ the term "subsection" when referring to the first level of organization within a numbered section, eschewing the term "subdivision" employed in statute. Exemplars of this convention may be found within this proposal, in 1 CCR 55 (c), (f), and (g).

2. 1 CCR 52. The ISOR entry for subsection (a) is admirably clear and quite persuasive in convincing the reader that readoption requires a "different factual justification" from that required for the initial adoption of

an emergency regulation and that consequently OAL review of requests for readoption serves a "different public purpose."

However as one progresses to the rationale for subsection (b), the character of the argument becomes obscure, particularly with regard to the necessity for paragraphs (b)(1) and (b)(2). Having just persuaded the reader that a different factual justification is required for the different public purpose of approving readoptions, the ISOR proceeds in an attempt to provide a rationale for regulatory provisions demanding an update of material that must be viewed as unrelated to the stated purpose of the proposed regulation. Moreover, the ISOR describes no basis for the necessity for these demands, simply stating that agencies "must" provide the required information. The ISOR entry is particularly challenging in stating that an agency must provide a statement "demonstrating the continued existence of the emergency", a requirement that does not appear to actually be a feature of the regulation text. Indeed, the regulation text is superior to the alleged requirement described in the ISOR in that it would be theoretically possible for an agency to report that the regulation, in keeping with 1 CCR 50(b)(2), had vanquished the circumstances leading to the serious harm and would continue to serve this purpose if allowed to continue in effect through readoption. Nonetheless, the relevance and necessity for paragraphs (b)(1) and (2) with regard to readoption is not established within the present ISOR.

Only paragraph (b)(3) serves the purpose of providing the factual justification that the OAL review of a readoption request requires. Unfortunately, the text of this paragraph resorts to the inherently vague "substantial evidence" criterion. While this may be viewed as a more flexible and "kinder, gentler" standard for state agencies to meet, clarity would be enhanced through clearly described benchmarks for what constitute "substantial progress" and "diligence." For example, agencies could be required to document landmark events in the promulgation of the regulations, such as publication of a notice of public proceedings, or conclusion of such proceedings, or publication of notices for additional changes (perhaps useful for the second readoption). Absent such criteria, it is unclear how an agency would be able to anticipate just what "substantial evidence" OAL would find acceptable in order to justify readoption.

Whatever the required documentation is to be, 1 CCR 52 does not clearly indicate in what form or by what means this material is to be provided. Is the documentation to be provided in the form of a certification, or a supplement to the FOE, or in some other manifestation? And, would a negative declaration need to be provided in regard to (paragraphs (b)(1) and (2) should there be no changes?

There are a few other minor observations with regard to the proposed regulation text. First, and for consistency with the structure of 1 CCR 50, should subsection (b) not include the phrase "to OAL" immediately prior to the colon preceding the numbered paragraphs? Second, should paragraph (b)(1) not also include the phrase "or prior readoption"? Third, perhaps clarity would be enhanced if the citation to Government Code section 11346.1 were to include the specific subdivisions relevant to the requirement.

3. 1 CCR 54. One of the most curious and arbitrary aspects of AB 1302 was the requirement, now embodied in Government Code section 11346.1(b), that if "the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations...the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations." There is, of course, no logical and necessary relationship between the point in time that an agency first becomes aware of a situation requiring emergency regulations and the point in time that an agency acts to adopt those regulations, apart from the obvious circumstance that the former must in some manner precede the latter. Still less is there any logical link to the necessity for emergency action at the time the action is advanced. Indeed, history is replete with instances in which the inaction of government agencies exacerbates the need for emergency action, rather than diminishes it. In any case, the time frame involved would vary from instance to instance, depending on the complexity of the circumstances. Hence, the origin and purpose of this provision is shrouded in obscurity. However, the requirement is conditional and apparently left to the discretion and probity of the initiating agency to meet. The proposed section appears to tacitly acknowledge this state of affairs by conspicuously not requiring an agency to make a negative declaration regarding this foreknowledge, or rather the lack thereof.

Nonetheless, the ISOR entry for this section seeks to convince the reader that anything beyond 270 days is "sufficient" forewarning to address the situation through nonemergency regulations, thus evoking the requirement. The argument is advanced on two lines, one "legal" and one based on OAL's experience (although notably, OAL's experience is as the recipient of emergency regulations, rather than being the developer and promulgator of such regulations). Neither line of argument is convincing, and both appear to founder on the same pragmatic consideration, that regulations do not spring fully formed on the date of notice publication or receipt by OAL.

All regulations, whether emergency or nonemergency, require time in which to evaluate the circumstances giving rise to the need for regulatory action, develop the requisite regulations, and secure the required control agency approvals (both at cabinet level and by the Department of Finance, in those instances in which a fiscal impact to state or local government occurs), before proceeding to adoption and/or notice. And, regulations may not become effective, nor notice be published until after OAL approval is secured. These simple verities have long been recognized in those not infrequent instances where the statutes authorize or mandate the adoption of regulations deemed to be emergency regulations after a passage of months, or years, or even an indefinite period following enactment of the underlying statute. For nonemergency regulations, statutes that mandate adoption also on occasion contain deadlines for adoption that lie years after enactment in order to provide for the development and approval process that must precede even public notice.

Thus, failure to include time for evaluation, development, and control agency approval (which for past emergency regulations has been withheld for periods of up to three years) within the period of foreknowledge deemed "sufficient" for nonemergency action ignores verities recognized implicitly in statute. Under such circumstances, the relevance of the one year allotted for validity of a public notice found in Government Code section 11346.4(b) appears to be chimerical. The relevance of this provision would, in any case, only be pertinent to that portion of the time necessary to promulgate a regulation following publication of a notice. Thus the assertion in the ISOR that the "Legislature clearly intended...a period of one year or less" by divination from a limitation placed on the effective period of a notice (which would appear to serve the quite distinct purpose of assuring some proximate relationship between the availability of the proposed action for comment to its ultimate exercise) must be viewed...from a lay reader's perspective, at least...as highly implausible.

Similarly, the 270 days specified in the proposed section also fatally fails to take into account the time required for development of an emergency regulation before transmittal to OAL. Indeed, OAL, having never developed and promulgated emergency regulations, apparently only considered its own experience in determining 270 days as a suitable trigger for the requirement, but that experience is relevant solely to the phase of promulgation following OAL receipt of an emergency regulation from another state agency. Indeed, the ISOR clearly describes its reliance upon the period from the initial adoption of emergency regulations to the final promulgation of "permanent regulations" as a basis for the 270 day standard. Equally clearly, the basis described for the 270 day standard excludes any allowance for development of the emergency regulations, let alone securing control agency approval. Given that the requirement in

Government Code section 11346.1(b) measures the time of vulnerability from the point at which the situation identified in the FOE "existed and was known by the agency adopting the emergency regulation," exclusion of development time from the proposed standard is indefensible. Consequently, the proposed 270 day standard simply fails to meet the statutory criterion for necessity.

Having thus dispatched the arguments of the ISOR for a 270 day period as having failed to provide an adequate basis for the necessity for the standard, what might prove a viable alternative? What would prove a supportable period of forewarning as to evoke the requirement for a *mea culpa* passage in the FOE? Looking to the experience of state agencies that promulgate emergency regulations from inception to permanent regulation, one discovers a formidable range of time frames, from several weeks to several years. And in statute, one finds indeterminate periods allotted for this task. Therefore, there is little useful that would assist us in formulating a rational trigger for the requirement in question. Perhaps if one were to perform a survey of all state agencies that develop and promulgate emergency regulations, one could select the mean or median time discovered necessary for these activities as the trigger. This would of course be a purely normative standard.

The key difficulty in developing a rational trigger lies in the lack of a necessary nexus between the need for emergency action in the present as compared with the extent of the issuing agency's foreknowledge of the circumstances giving rise to the necessity for the immediate action. Thus, any criterion chosen to function as a trigger must, at least to some degree, be arbitrary. So perhaps in the end, one should conclude that the presence of a passage in the FOE setting forth "facts explaining the failure to address the situation through nonemergency regulations" should be left, as touched upon previously, to the untrammelled discretion (and conscience) of the adopting agency. Certainly, the presence or absence of such a passage would be irrelevant to the determination as to whether or not the FOE supported the need for immediate action, in the present moment, as represented by an emergency regulation.

Under these circumstances, the statement in the ISOR that, in requiring such passages, "AB 1302 imposes a new requirement in justifying the use of the emergency regulation process" considerably overstates the possible effect of this imposition. Since there could be no necessary and logical effect on the justification for the emergency, the imposition can be no more than merely a requirement for an occasional historical footnote to the emergency action.

4. 1 CCR 55. Subsection (b) now includes language for an exception to the notice requirement that must be regarded as unclear until such time as viable and objective criteria may be forthcoming for determining just what "such an immediate, serious harm" may justify dispensing with the delay attendant upon the requisite notice and review period for comments.

CLOSING OBSERVATION. While the APA authorizes and even directs OAL to promulgate administrative regulations, the APA signally fails to provide for the review of OAL rulemaking by an independent entity, an oversight that places OAL squarely upon the horns of an ethical dilemma. For OAL to review and bless its own rulemaking activities undeniably represents a conflict of interest. For example, how could OAL be objective in gauging the adequacy or even responsiveness of its own responses to comments in the final statement of reasons? Or, whether or not the rationale provided for the necessity of any regulatory requirement was indeed adequate?

As with the effort to promulgate regulations in response to AB 1302, the lack of an overseer for the overseer places OAL, its regulated community, and the public in an unenviable position where there are no good answers...or at least none that would not appear to entail legislative action.

**Comments Received During
15-Day Comment Period**

Public Comments

Received during 15-day comment period:

Herb Bolz, email dated 11/9/07

C.E. Smith, email dated 11/15/07

From: Bolz, Herb [HBolz@cgcc.ca.gov]
Sent: Friday, November 09, 2007 4:55 PM
To: Reference Attorney
Subject: RE: Fiscal Impact portion of Form 399

Thank you, that is helpful.

We have discussed this issue with the Department of Finance. They said that they want us (the Commission) to fill in the part of the form that OAL requires be filled in, the Fiscal Impact part. Thus, since the Commission began operation, in 2001, we have been filling in only the Fiscal Impact part of the Form 399, with no objections from Finance or from OAL. For major rulemaking efforts (such as regulating use of diesel engines in California), the Economic Impact information might conceivably be of some value. For our Commission rulemaking projects generally, the costs of filling in the Economic Impact information appear to exceed the benefits.

My question was triggered by language in the 15-day change dated October 29, 2007, recently sent out by OAL. Part of this proposal would appear to require all adopting agencies to fill in both parts of the Form 399 whenever submitting emergency regulations for OAL. Such submissions would need to include:

(4) A completed Standard Form 399 prepared in accordance with instructions by the Department of Finance.

This leads to two questions:

First, does this proposed language reflect a policy decision to begin to require all agencies submitting emergency regulations to OAL to fill in not only the Fiscal Impact information mandated by the APA, but also the Economic Impact information requested by the former Trade and Commerce Agency?

Second, if "yes," is it the intent of OAL to require the Economic Impact information when agencies submit emergency filings, but not regular rulemaking filings?

Possible solution: replace "Standard Form 399" with "Fiscal Impact Statement," in (4), above, if the intent is to preserve the status quo. This would be consistent with the authority granted to the Department of Finance in Government Code section 11357(a)(4) & (b).

Thank you for taking time to discuss this.

Herb

George C. Shaw

From: Reference Attorney
Sent: Friday, November 16, 2007 9:48 AM
To: Melvin Fong; Susan Lapsley; Executive; George C. Shaw; Reference Attorney
Subject: FW: Comments Regarding Modifications to Text of Proposed Regulations (per Notice issued 29 OCT 07)

Forwarded for further handling.

Comment on OAL's AB1302 regs 15-day notice from Chuck Smith. Note that he claims to have not received the mailed 15-day notice that he was entitled to as a 45-day commenter.

From: mrsces [mailto:mrsces@charter.net]
Sent: Thursday, November 15, 2007 6:13 PM
To: Reference Attorney
Subject: Comments Regarding Modifications to Text of Proposed Regulations (per Notice issued 29 OCT 07)

Your Office is to be congratulated on the present efforts to improve the proposed regulations, perhaps most notably in deleting proposed section 1 CCR 54.

However, the additions to 1 CCR 50(a) appear somewhat problematic, at least in part. While the necessity for newly added requirements in (a)(1), (2), and 3) may appear self evident in the light of existing regulation and statute, the necessity for paragraph (a)(4) is decidedly not, and would have benefited by the addition of a supplement to the initial statement of reasons (or rather the reader would have benefited thereby).

Paragraph (a)(4) represents a requirement new to the regulations issued by your Office and appears to incorporate by reference both the form STD 399 and "instructions by the Department of Finance." The proposed incorporation of these documents does not appear to satisfy the requirements of 1 CCR 20. Certainly the date of publication is omitted for both and the "instructions" are not identified by date, title of publication, or (given the voluminous Department of Finance (DOF) "instructions" published in the State Administrative Manual (or SAM)) section numbers. While it may be noted that DOF enjoys an exemption from the rigors of the Administrative Procedure Act (APA) in publishing certain "instructions" in SAM, this exemption would not appear to apply to your Office when adopting those "instructions" for purposes of establishing requirements for the filing of emergency regulations. Accordingly, 1 CCR 20 would seem applicable to the proposed incorporation and, indeed, all regulatory criteria established in the APA would appear applicable to the newly incorporated "instructions" as well.

But, the requirement for a STD 399 presents the most problematic aspect of proposed paragraph (a)(4). The current STD 399 is composed of an Economic Impact Statement (EIS) as well as a Fiscal Impact Statement. Indeed, the EIS comprises the most complex element of the STD 399. Yet, the DOF "instructions" cited do not address the complexities and confusions of the EIS, other than to express only the most cursory and limited interest of DOF in the content thereof. This lack of interest is hardly surprising since the estimate of fiscal impact required by Government Code section 11346.5(a)(6) is only to be found in the Fiscal Impact Statement within the STD 399, and for which DOF has indeed issued "instructions" in SAM. Alas, SAM merely refers readers to a now defunct state agency for clarification of the vagaries of the EIS. Thus the document now proposed as a requirement for the filing of emergency regulations is severely compromised in clarity, as well as necessity (for the EIS is nowhere required in the APA). Perhaps the most viable course would be to abandon the STD 399 and revise the text of proposed paragraph (a)(4) to read verbatim as Government Code section 11346.5(a)(6), i.e. "(4) An estimate prepared...to the state."

12/20/2007

I note in passing that I have not as yet received notice of the proposed modifications, but learned of them through other interested parties (although I believe that my previous comments included my address). Be assured of my continued interest in the proposed regulations. My name and address are as follows: Charles E. Smith, 2520 Meadowlark Circle, West Sacramento, CA 95691.

12/20/2007